Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

RICHARD A. SIMONEAUX,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For A Writ Of Certiorari
to The Mississippi Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court must inquire into the origins of the guilty plea of a criminal defendant to determine if the plea is constitutionally valid.

PARTIES TO THE PROCEEDING

The parties are named in the caption. The Petitioner, Mr. Richard A. Simoneaux, was the defendant-appellant below. The Respondent is the State of Mississippi, appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

I. State Courts of Final Resort and the Federal Circuits Are Deeply Divided Regarding a Trial Court's Duty to Ascertain the Constitutional Sufficiency of a Guilty Plea 9

II. The Petition Raises Important and Recurring Due Process Issues Regarding the Sufficiency of Guilty Pleas Which Are Heavy Burdens on the Appellate Systems of the States 20

CONCLUSION 22

APPENDIX:

Opinion of the Mississippi Court of Appeals ..... App. 1

Order of Pike County Circuit Court ..... App. 42

Order of the Mississippi Supreme Court denying Writ of Certiorari ..... App. 45

Plea Colloquy of Richard A. Simoneaux ..... App. 46

TABLE OF AUTHORITIES

Cases

Aragen v. State, 2008 WL 4308390 (Tex.App.-Dallas Sept. 23, 2008) 17
Boyett v. State, 924 So. 2d 577 (Miss. Ct. App. 2005) 22
Boykin v. Alabama, 395 U.S. 238 (1969) ..... *passim*
Bradshaw v. Stumpf, 545 U.S. 175 (2005) ..... *passim*
Brady v. U.S., 397 U.S. 742 (1970) 3
Brown v. State, 876 So. 2d 422 (Miss. Ct. App. 2004) 22
Drake v. State, 82 So. 2d 593 (Miss. Ct. App. 2002) 22
Gross v. State, 973 A.2d 895 (Md.App. 2009) 17
Halbert v. Michigan, 545 U.S. 605 (2005) 3
Harris v. State, 5 So. 3d 1127 (Miss. Ct. App. 2008) 22
Henderson v. Morgan, 426 U.S. 637 (1976) 11
Jennings v. State, 896 So. 2d 374 (Miss. Ct. App. 2004) 22
Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008) 22
Lockhart v. State, 980 So. 2d 336 (Miss. Ct. App. 2008) 22
Mack v. U.S., 635 F.2d 20 (1st Cir. 1980) 21
Marshall v. Lonberger, 459 U.S. 422 (1983) 11
McCarthy v. U.S., 394 U.S. 459 (1969) 21
Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006) 22
Neal v. State, 936 So. 2d 463 (Miss. Ct. App. 2006) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Peckinpaugh v. State, 949 So. 2d 86 (Miss. Ct. App. 2006) 22
Simoneaux v. State, 29 So. 3d 26 (Miss. Ct. App. 2009) 1, 18, 19, 22
Smith v. State, 618 S.E.2d 182 (Ga.App. 2005) 16
State v. Apple, 759 N.W.2d 283 (S.D. 2008) 15, 21
State v. Fitzpatrick, 810 N.E.2d 927 (Ohio 2004) 18
State v. Rogers, 545 P.2d 930 (Ariz. 1976) 17
U.S. v. Boatright, 588 F.2d 471 (5th Cir. 1979) 13
U.S. v. Coronado, 554 F.2d 166 (5th Cir. 1977) 13
U.S. v. Diaz-Vargas, 35 F.3d 1221 (7th Cir. 1994) 14
U.S. v. Garcia, 587 F.3d 509 (2nd Cir. 2009) 21
U.S. v. Gonzalez-Rodriguez, 290 Fed.Appx. 765 (5th Cir. 2008) 14
U.S. v. Hildenbrand, 527 F.3d 466 (5th Cir. 2008) 13
U.S. v. London, 568 F.3d 553 (5th Cir. 2009) 12
U.S. v. Repella, 2009 WL 4643829 (3rd Cir. Dec. 9, 2009) 14
Williams v. State, 31 So. 3d 69 (Miss. Ct. App. 2010) 22

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard A. Simoneaux respectfully submits this petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of Mississippi.

OPINION BELOW

The opinion of the court of appeals is published at *Simoneaux v. State*, 29 So.3d 26 (Miss. Ct. App. 2009). App. at 1. The order of the Mississippi Supreme Court denying the petition for writ of certiorari is reported in a table. 29 So.3d 774 (Miss. 2010). App. at 45.

JURISDICTION

The Mississippi Court of Appeals filed its opinion on July 21, 2009. The Mississippi Supreme Court denied the petition for writ of certiorari on March 4, 2010, or within 90 days of the filing of this Petition. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a), which governs appeals from state courts.

Further, review is proper under Supreme Court Rule 10(b), where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Review is also proper under Rule 10(c) because the Mississippi Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. IV Sec 1.

The Fifth Amendment provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend V.

The Sixth Amendment requires that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury," and to "be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him . . . ." U.S. Const. amend VI.

STATEMENT OF THE CASE

A guilty plea must meet certain requirements before it is constitutionally valid under the Fourteenth Amendment. Yet the law among the states and in the lower federal courts is anything but uniform when it comes to distinguishing between a constitutionally valid guilty plea—a valuable form of criminal court disposition that lowers costs for the courts, the public, and both the prosecution and the defendants—and unconstitutional pleas which result in the unnecessary incarceration of innocents, the

mentally infirm, the ignorant, those with ineffective counsel, and those who are simply scared. Court systems also face the heavy burden of dealing with appeals stemming from faulty pleas.

The courts of Mississippi have begun to drift so far from the constitutional requirements of guilty pleas that its rulings are in direct conflict with Supreme Court precedent. This case affords the Court the opportunity to bring much-needed clarity to this issue.

The case arises out of the guilty plea of the petitioner, Mr. Richard A. Simoneaux, for the alleged assault of an elderly woman in a nursing home and related crimes. In examining guilty pleas, this Court has held that a trial court "*cannot presume* a waiver of these three important federal rights [against self-incrimination, to a trial by jury, and the right of confrontation] from a silent record." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (emphasis added); *accord Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005) (a defendant's "guilty plea would indeed be invalid if he had not been aware of the nature of the charges against him, including the elements of the [charge] to which he pleaded guilty"). For "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. U.S.*, 397 U.S. 742, 748 (1970); *accord Halbert v. Michigan*, 545 U.S. 605, 624 (2005).

Yet as both the special concurrence and the dissent emphasized in the decision below, there is no clarity as to *what* information a trial court is required to ascertain before accepting a guilty plea, and even within the State of Mississippi the same

court has tendered conflicting opinions on what is constitutionally sufficient. App. at 27, 28-30.

Recent jurisprudence from this Court has not clarified this critical issue. "Where a defendant pleads guilty to a crime *without having been informed of the crime's elements*, this standard [of constitutionality] is not met and the plea is invalid." *Stumpf*, 545 U.S. at 182-83 (2005) (emphasis added). Nonetheless, "the constitutional prerequisites of a valid plea *may be satisfied* where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Id.* (emphasis added).

In accord with the federal courts, many state courts of final resort have held that, to tender a constitutionally sufficient guilty plea, a trial court must inquire into the details surrounding the plea. Yet in contravention of Supreme Court precedent, some states treat this legal necessity as mere formality, and do not even require the reading of the indictment.

This uncertainty regarding the line separating valid and constitutional guilty pleas from an unjustified waiver of guaranteed freedoms is constitutionally intolerable. It is equally intolerable that in some states the accused may tender a guilty plea without being informed of the basic facts surrounding the indictment or being put on notice of the charges marshaled against them. This Court's review is warranted to provide certainty regarding the distinction between constitutionally valid guilty pleas and those which fall below the guaranteed protections of the Fourteenth Amendment.

A. Factual Background and Guilty Plea.

Petitioner Richard A. Simoneaux was indicted and charged with burglary, attempted burglary, voyeurism, sexual battery, and sexual abuse of a vulnerable adult. App. at 2-4. He plead guilty to each of these charges in a remarkably brief plea hearing. App. at 2. The guilty pleas included a "package deal" agreed to by Mr. Simoneaux's counsel, "complete with sentencing recommendations from the State." App. at 2-3. Astonishingly, his counsel had "agreed upon [a] sentencing recommendation" to have Mr. Simoneaux *banished from the State of Mississippi* upon his release from prison. App. at 22-23.

During the brief plea colloquy the two indictments were not read. App. at 32, 46-58. The specifics and details of the underlying charges were not addressed by the trial court or the prosecutor. App. at 4.

The trial court judge did not ask the defendant any questions about the underlying facts of the six charges against him, and Mr. Simoneaux never testified that he did anything in particular, nor did he admit he committed any crimes within the court's jurisdiction—he mostly says "yes sir" over and over. App. at 30-31. The indictments were not detailed and did not contain any information of overt acts or specific facts regarding the crimes. App. at 31-33.

After the perfunctory recitation by the trial court, the judge inquired as to Mr. Simoneaux's religious beliefs:

> THE COURT: . . . Mr. Simoneaux, they're going to have church services wherever you are.

> DEFENDANT SIMONEAUX: Yes, sir, I have already been attending them at the jail where I'm at now, sir.
>
> THE COURT: Continue with that and ask the good Lord to help you get over this tendency to do such as what you have done.

App. at 55-56.

Shortly thereafter Mr. Simoneaux asks a question about his banishment, and the court states that "You lucky somebody hasn't shot you. You really are. [That] Somebody hasn't taken a violent measure toward you." App. at 56.

B. Appellate Proceedings.

On appeal for post-conviction relief, the defendant requested that his guilty plea be set aside because it was not knowing, voluntary, or intelligently given. App. at 2.[1] Among other relief, he requested that the sentence of banishment be reversed. App. at 3.[2]

As an initial matter, the plurality decision noted that "[i]t is undisputed that neither Simoneaux nor the State laid out all of the specific, detailed facts of the underlying charges when he pled guilty." App. at4.[3] Despite citation to *Stumpf*, and the scant

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[1]The information required by Rule 14(g)(i) is summarized in this section.

[2] This relief had first been requested of the trial court in a motion for post-conviction relief. App. at 3.

[3]The Mississippi Court of Appeals has ten members. Four voted to affirm the guilty plea of Mr. Simoneaux, with another specially concurring; four voted that it should be withdrawn, with one judge concurring in result only. App. at 22.

information contained in the plea colloquy, the plurality found that Mr. Simoneaux's plea was constitutionally sufficient. App. at 13-14.

Yet the plurality could not agree with the banishment provision of Mr. Simoneaux's sentence, even though it twice pointed out that his counsel had agreed to it. App. at 22-25. Mississippi law had forbid such blanket banishment on reasons of public policy since 1991, relying on a Third Circuit case from 1985. App. at 25. The plurality joked that "[w]hile banishing Simoneaux from Mississippi would perhaps provide a degree of protection for citizens of our state, we certainly do not want our sister states repaying us for the favor." App. at 25. For those reasons it deleted the banishment provision from his sentence.

Despite the fact that his lawyer had agreed to a provision that was outlawed nearly two decades before, and in the face of other allegations of deficient counsel, the plurality held that the court-appointed lawyer had not been ineffective. App. at 15-19.

The special concurrence reacted with distaste at the opinion; while agreeing that the circuit court should be affirmed, the concurrence worried that the court was "being inconsistent in applying the law . . . where there is a challenge to the factual basis undergirding the plea, thereby giving the impression that the Court is result oriented." App at 27. The concurrence pointed out a 2009 case from the same court that reached a wholly different conclusion, where "the facts [in the previous case] argue at least as forcibly as do the facts here, if not more so, for the existence of a factual basis [for the withdrawal of a plea]." App. at 27. The concurrence was "unable to

discern why the facts here are pregnant while the facts [in the previous case] are barren." App. at 27.

The dissent was discouraged that this was "another . . . proceeding in which this Court must determine whether an adequate factual basis exists in the record of the plea hearing to support the circuit court's acceptance of the defendant's felony guilty pleas." App. at 28. It emphasized that "[t]he circuit court judge did not ask Simoneaux any questions about the underlying facts of any of the six charges," and the defendant "never testified that he actually did anything in particular," nor was there any evidence that the alleged crimes occurred within the trial court's jurisdiction. App. at 30.

The dissent also focused on the scarcity of detail in the indictment and that "the two indictments *were not read* during Simoneaux's guilty plea hearing." App. at 32 (emphasis in original). Indeed, the dissent "was unable to discern any point at which the circuit court addressed any specific crime during the guilty plea hearing . . . ." App. at 35. Troublingly, the dissent noted that in two previous cases regarding the factual sufficiency of guilty pleas—including the one referred to by the special concurrence—both "were conducted by the same circuit court judge . . . who also conducted Simoneaux's guilty plea hearing." App. at 39.

Ultimately, the dissent thundered that:

> [T]here were no facts elicited during a preliminary hearing, no petitions to plead guilty, no reading of the indictments during the plea hearing, no introduction or reference to incriminating statements, no recitation of the evidence expected to be presented if Simoneaux did not plead guilty, no specific

> factual details presented by Simoneaux, and no questioning by the circuit court as to those facts. . . . All things considered, I cannot find that a factual basis existed for any of his guilty pleas.

App. at 40-41.

Despite the presence of a the 5-5 split at the intermediate appellate court, the Mississippi Supreme Court refused to grant a writ of certiorari. App. at 45.

REASONS FOR GRANTING THE PETITION

There is a deep divide between how guilty pleas are treated within the federal circuits and state courts of final resort. Certiorari must be granted in order to resolve the question of what a trial court is required to ascertain for a plea to be constitutionally sufficient.

I. State Courts of Final Resort and the Federal Circuits Are Deeply Divided Regarding a Trial Court's Duty to Ascertain the Constitutional Sufficiency of a Guilty Plea.

This Court's review is warranted to resolve the pervasive disagreement between state courts of final resort and the federal circuits regarding the extent a trial court must inquire into the sufficiency of a guilty plea to determine if it is constitutionally solid. That disagreement arises out of the these courts' irreconcilable interpretations of this Court's decisions in *Boykin* and *Stumpf*.

A. *The Supreme Court Standard.*

In *Boykin*, three days later a criminal defendant received appointed counsel, he "plead[] guilty to all

five indictments," and "[s]o far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court." 395 U.S. at 239.

The Court explained that "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* Therefore "[p]resuming waiver from a silent record is impermissible." *Id.*

Since this "plea of guilty is more than an admission of conduct; it is a conviction," the trial court must inquire into its origins: "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Id.* at 242-43.

"Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial," among them "the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth," "the right to trial by jury," and "the right to confront one's accusers." *Id.* at 243. The Supreme Court "cannot presume a waiver of these three important federal rights from a silent record." *Id.*; *accord Stumpf*, 545 U.S. at 182-83 (a defendant's "guilty plea would indeed be invalid if he had not been aware of the nature of the charges against him, including the elements of the [charge] to which he pleaded guilty").

Quite simply, "[w]hat is at stake for an accused facing death or imprisonment demands *the utmost solicitude of which courts are capable* in canvassing the matter with the accused to make sure he has a

full understanding of what the plea connotes and of its consequence." *Id.* at 243-44 (emphasis added). In *Boykin*, this failure to tender "the utmost solicitude" resulted in a reversal of the conviction for guilty plea. *Id.* at 244.

Despite the clear language of *Boykin* that courts were to use "the utmost solicitude," the Court has more recently and gently noted that there is no bright line rule, stating in *Stumpf* that:

> [W]e have never held that the judge *must himself explain* the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea *may be satisfied* where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.

545 U.S. at 183 (emphases added).

It is uncontested that whether it is a state court or federal court examining the issue, "the governing standard as to whether a plea of guilty is voluntary for purposes of the federal Constitution is a question of federal law . . . ." *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983); *accord Boykin*, at 243 ("The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards").

As the Supreme Court has ruled, "[a] plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). "Without adequate notice of the nature of the

charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense." *Id.* at 645, n.13.

"And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Id.* at 645 (internal quotations omitted).

B. *The Approach of the Federal Courts.*

Notwithstanding the seemingly clear holdings of *Boykin* and the guidance of *Henderson*, courts remain deeply split on what a trial judge must *actually determine* regarding a guilty plea—a split encouraged by the vague dicta of *Stumpf*.

The federal courts have shown greater fidelity to *Boykin* than state courts, in part because of the adoption of Rule of Criminal Procedure 11, which sets out extremely detailed procedures that must be followed for the plea to be accepted, such as requiring trial courts to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises," and determine to the court's satisfaction "that there is a factual basis for the plea."

As the Fifth Circuit has held, "[t]he district court *must* compare (1) the conduct to which the defendant admits with (2) the elements of the offense charged in the indictment or information." *U.S. v. London*, 568 F.3d 553, 559 (5th Cir. 2009) (internal quotations omitted). "In adhering to the rule's mandate that it address the defendant personally, the court should engage in extensive an interchange as necessary to assure itself and any subsequent

reader of the transcript that the defendant does indeed fully understand the charges." *U.S. v. Coronado*, 554 F.2d 166, 173 (5th Cir. 1977)

Accordingly, in general "[r]eading an indictment to a defendant is usually not an adequate explanation of the charges to the defendant." *U.S. v. Boatright*, 588 F.2d 471, 473 (5th Cir. 1979). "Courts which have sought to implement Rule 11 agree that reading an indictment will usually not suffice." *Mack v. U.S.*, 635 F.2d 20, 25 (1st Cir. 1980). For "[s]imply informing a defendant of the charges does not establish on the record that the court personally determined that the defendant understood the charges." *Id.* (internal citation and quotation omitted).

For in the end, "[s]ome defendants are more sophisticated than others," and "[s]ome charges are more difficult to understand than others . . . But no matter how simple the charges, a district court should make the minor investment of time and effort necessary to set forth their meaning and demonstrate on the record that the defendant understands." *Id.* at 26 (internal quotations omitted).

Some courts have held that when an indictment is extremely detailed it can possibly support a guilty plea, even if no other facts are introduced pursuant to *Boykin*'s requirement that a trial judge inquire further. *See U.S. v. Hildenbrand*, 527 F.3d 466, 475 (5th Cir. 2008) ("If sufficiently specific, an indictment or information can be used as the sole source of the factual basis for a guilty plea"). However, a vague indictment standing alone cannot support a guilty plea. *See Boatright*, 588 F.2d at 475 (Fifth Circuit reversed where the "indictment in this case is not sufficiently specific to tie defendant to the

illegal gun dealing conspiracy," as "it fails to allege any facts tying him to the conspiracy," and "Rule 11 requires that the factual basis for each essential element of the crime be shown"); *accord U.S. v. Repella*, 2009 WL 4643829, *2 (3rd Cir. Dec. 9, 2009) (where "[t]he government failed to establish bank fraud" as it did not detail facts "in the indictment, plea-colloquy transcript or the PSR [pre-sentence report]," the conviction from a guilty plea was reversed); *U.S. v. Gonzalez-Rodriguez*, 290 Fed.Appx. 765, 766 (5th Cir. 2008) (guilty plea factually sufficient when "[t]he indictment in this case, which was read aloud . . . alleged the drug quantity at issue and was sufficient to serve as the factual basis supporting [the defendant's] pleas").[4]

Ultimately, the Seventh Circuit is blunt that "the preferred method is for the court to engage the defendant in a colloquy concerning the risk inherent in pleading guilty." *U.S. v. Diaz-Vargas*, 35 F.3d 1221, 1225 (7th Cir. 1994). That court also cautioned that "[i]nquiring only in all encompassing terms whether a defendant has read and understood a plea agreement is not the best method to ensure that a defendant understands the full implications of his decision." *Id.*

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[4] Chasing further down this rabbit hole, some courts have begun to examine whether reading an indictment is enough by examining the complexity of the crimes charged. *See U.S. v. Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) (while reading indictment might be enough for "simple" crimes, "reading of the indictment and defendant's admission of guilt [were] not sufficient compliance with" Rule 11 on a complex charge of conspiracy).

C. *The Approach of State Courts.*

In contrast with the guidance of the federal circuits on this federal question, the state courts of final resort have been wildly inconsistent. Some state courts mirror the federal approach in seeking "the utmost solicitude of which courts are capable."

The Supreme Court of South Dakota is firm that "[a] judge has the duty to make sure that a defendant understands the consequences of entering a guilty plea and the rights the defendant is waiving," and "[t]he process should be careful and deliberate with convincing results." *State v. Apple*, 759 N.W.2d 283, 290 (S.D. 2008). This process "must involve meaningful communication between the judge and the defendant." *Id.*

Taking *Boykin* to heart, that court held:

> It is essential that this suggested colloquy between the judge and the defendant be meaningful. *Simple affirmative or negative answers or responses which merely mimic the indictment or the plea agreement cannot fully elucidate the defendant's state of mind.* For this reason the trial court should question the defendant in a manner that requires the accused to provide narrative responses. Questions concerning the setting of the crime, the precise nature of the defendant's actions, or the motives of the defendant, for instance, will force the defendant to provide the factual basis in his own words. The court should not be satisfied with coached responses, nor allow a defendant to be unresponsive.

Id. at 289-90 (internal quotations and citations omitted) (emphasis in original).

The State of New York would concur with such attention to detail in seeking "the utmost solicitude." In one recent appellate case, a guilty plea was not knowing, voluntary, and intelligent when "the defendant was not advised that she had a possible defense to the felony charges in the indictment and the charge to which she originally agreed to plead guilty," "the court never asked the defendant whether she had discussed possible defenses with her attorney," and "[a]ll of this was done without any explanation to the defendant by the court or defense counsel." *People v. Rhodes*, 62 A.D.3d 815, 817 (N.Y.A.D. 2 Dept. 2009).

Likewise, the State of Georgia has upheld the entry of a guilty plea when "the prosecutor went through each count of the indictment in detail to ensure that he is aware of the consequences and what he faces if he represents himself." *Smith v. State*, 618 S.E.2d 182, 186 (Ga.App. 2005) (internal quotation omitted). Additionally, "[t]he State also explained to [the defendant] each possible punishment and the possible defenses on each count," and "[t]he plea hearing transcript shows that the State then repeated again its detailed explanation of the charges and their factual basis and informed [the defendant] of all the rights he was giving up by pleading guilty." *Id.*

An unreported Texas case also signals the depth of deference some states give *Boykin*. A guilty plea was sufficient when "[t]he indictment alleged the elements of the offense, including venue and that the prosecution was within the statute of limitations," and "[t]he indictment was read aloud" to the

defendant, and even translated into Spanish for him, and he "signed both an English and Spanish version of his written plea agreement." *Aragen v. State*, 2008 WL 4308390, *3 (Tex.App.-Dallas Sept. 23, 2008).

On the other hand, other states have dramatically departed from the essential investigation by a trial court into the circumstances of the guilty plea. For instance, in Arizona, "[i]t is not necessary for the court to explain the elements of the crime to the accused before the plea can be considered intelligent and voluntary." *State v. Rogers*, 545 P.2d 930, 932 (Ariz. 1976).

More recently, some states have begun to rely on *Stumpf* to say that a shallow inquiry is permissible—or, in the case at hand, that even *no* inquiry by the trial judge is constitutionally sufficient. As a result, the standard has shifted from "utmost solicitude" to "routine questioning," the standard explicitly rejected by South Dakota. In one recent Maryland case, the court found that the guilty plea was not defective because the defendant "told the plea judge that he had received a copy of the indictment . . . and had discussed the charges and 'gone over' the elements of the charges with his counsel." *Gross v. State*, 973 A.2d 895, 912-13 (Md.App. 2009). The trial court in that case "did not tell [the defendant] that if he had gone to trial he would have been able to invoke his right against self-incrimination." *Id.* at 898.

No matter, the court reasoned, because Maryland allowed a "presumption" that the constitutional rights were properly waived instead of the heavier *Boykin* standard, so that "even without an express statement by the court of the elements of the crimes

charged, it is appropriate *to presume* that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.* at 910 (emphasis added). Therefore the court ruled that "[u]nder such circumstances, it was entirely proper for the court *to presume* that appellant knew the elements of the charge to which he agreed to plead guilty." *Id.* at 912-13 (emphasis added). This is despite the fact that *Boykin* is adamant that a trial court "*cannot presume* a waiver of these three important federal rights [against self-incrimination, to a trial by jury, and the right of confrontation] from a silent record." 395 U.S. at 242 (emphasis added).

The State of Ohio follows a similarly deficient approach in presuming constitutionality; for a guilty plea to be sufficient "a detailed recitation of the elements of the charge is not required . . . ." *State v. Fitzpatrick*, 810 N.E.2d 927, 936 (Ohio 2004). Contrary to *Boykin* and prevailing federal law, Ohio holds that "the Constitution does not require that a trial court explain the elements of the charge, at least where the record contains a representation by defense counsel that the nature of the offense has been explained to the accused." *Id.* at 936-37.

C. ***The Decision of the Mississippi Court of Appeals Falls below Constitutional Requirements.***

Perhaps the most dramatic departure from *Boykin* is contained in the case at hand. Unlike the staunch requirements of the federal courts, in this case "[i]t is undisputed that neither Simoneaux nor the State laid out all of the specific, detailed facts of the underlying charges when he pled guilty." *Simoneaux*, 29 So. 3d at 30 (Per Maxwell, J., with three Judges concurring and one Judge specially

concurring).[5] The affirming plurality does not cite to *Boykin*, but uses *Stumpf* to bolster its assertion that it does not matter that "the failure to [detail the underlying charges] does not in and of itself render a guilty plea involuntary, nor does it cause a factual showing to fail merely because the details that may be brought forth at trial are not fleshed out." *Id.* at 34, 30 (Per Maxwell, J., with three Judges concurring and one Judge specially concurring). Just as the Maryland Court of Appeals, the Mississippi Court of Appeals *presumes* that the plea is constitutionally valid.

As the dissent in the case pointed out, "[t]he circuit court judge did not ask Simoneaux any questions about the underlying facts of any of the six charges," and the defendant "never testified that he actually did anything in particular," nor was there any evidence that the alleged crimes occurred within the trial court's jurisdiction. *Id.* at 41 (Roberts, J., dissenting). In addition, the indictment was greatly lacking in detail and "the two indictments *were not read* during Simoneaux's guilty plea hearing." *Id.* at 42 (Roberts, J., dissenting) (emphasis in original). Indeed, the dissent "was unable to discern any point at which the circuit court addressed any specific crime during the guilty plea hearing . . . ." *Id.* at 44

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[5] This dicta suggests the Mississippi Court of Appeals presumes that it is the *accused's* burden to prove that the plea hearing comported with constitutional standards. It is not; this is borne by the trial court. *See Boykin*, at 244 ("When *the judge* discharges that function [of inquiry], he leaves a record adequate for any review that may be later sought . . . .") (emphasis added).

(Roberts, J., dissenting). The dissent concluded that "[a]ll things considered, I cannot find that a factual basis existed for any of his guilty pleas." *Id.* at 46 (Roberts, J., dissenting).

The *Simoneaux* case demonstrates how broken the system of guilty pleas has become in the decades following *Boykin*, especially after the tepid guidance of *Stumpf*. Courts have begun to explicitly ignore the *Boykin* mandate against "presuming" a waiver of constitutional rights valid—in essence, to return to the common law as it existed pre-*Boykin*. Without a doubt, the plea which the Mississippi Court of Appeals accepted as constitutional would be rejected out of hand in South Dakota.

It is critical that the Court act to resolve the splits between state courts of final resort and the federal circuits. The requirement that a trial court investigate the waiver of constitutional rights has become so watered down that it swept away as a mere roadblock in the machinery of the criminal courts.

Because there is split in the approach between the federal courts and state courts of final resort of how to address the constitutionality of a guilty plea, this Court should grant certiorari.

II. The Petition Raises Important And Recurring Due Process Issues Regarding the Sufficiency of Guilty Pleas Which Are Heavy Burdens on the Appellate Systems of the States.

The Court should grant certiorari to provide valuable guidance to the States regarding the handling of guilty pleas. Such guidance would result

in an almost immediate benefit in the conservation of resources of the Bench and Bar.

As the Second Circuit has made clear, there is a major policy reason for the "overarching requirement . . . that the court assure itself simply that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty." *U.S. v. Garcia*, 587 F.3d 509, 514 (2nd Cir. 2009) (internal quotations and citations omitted). Namely, it "is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Id.* (internal quotations and citations omitted).[6]

As the Supreme Court of South Dakota has held, "[s]hortcuts in procedure cast doubt on the validity of guilty pleas and lead to post-conviction challenges." *Apple*, 759 N.W.2d at 291.

As the Supreme Court and the First Circuit have ruled, fidelity to the rules regarding the sufficiency of guilty pleas "not only protects the accused, but also helps 'reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate.'" *Mack v. U.S.*, 635 F.2d 20, 27 (1st Cir. 1980) (*quoting McCarthy v. U.S.*, 394 U.S. 459, 472 (1969)).

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[6] In *Garcia*, the Second Circuit ultimately reversed because it was apparent that had the defendant "fully understood the nature of the crime he was charged with, he would not have pled guilty." 587 F.3d at 520-21.

Clarity in the procedure would greatly eliminate the burden on state appellate systems. In just the past few years, the Mississippi Court of Appeals has been inundated with challenges to the sufficiency of guilty pleas; as the special concurrence in *Simoneaux* warned, the wide variety of results in the cases demonstrated that in his opinion "this Court is being inconsistent in applying the law . . . where there is a challenge to the factual basis undergirding the plea, thereby giving the impression that the Court is result oriented." *Simoneaux*, at 40 (Irving, J., specially concurring). *See Williams v. State*, 31 So. 3d 69, 79 (Miss. Ct. App. 2010); *Simoneaux*, *supra*; *Harris v. State*, 5 So. 3d 1127 (Miss. Ct. App. 2008); *Kimble v. State*, 983 So. 2d 1069 (Miss. Ct. App. 2008); *Lockhart v. State*, 980 So.2d 336 (Miss. Ct. App. 2008); *Neal v. State*, 936 So. 2d 463 (Miss. Ct. App. 2006); *Peckinpaugh v. State*, 949 So. 2d 86 (Miss. Ct. App. 2006); *Morris v. State*, 922 So. 2d 860 (Miss. Ct. App. 2006); *Boyett v. State*, 924 So. 2d 577 (Miss. Ct. App. 2005); *Jennings v. State*, 896 So. 2d 374 (Miss. Ct. App. 2004); *Brown v. State*, 876 So. 2d 422 (Miss. Ct. App. 2004); *Drake v. State*, 82 So. 2d 593 (Miss. Ct. App. 2002).

Because clarity in the requirements of accepting a guilty plea would greatly reduce the burden on the appellate courts, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, as Mr. Simoneaux was deprived his constitutional rights.

Respectfully submitted.

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June 2, 2010

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01983-COA

RICHARD A. SIMONEAUX, APPELLANT

v.

STATE OF MISSISSIPPI, APPELLEE

DATE OF JUDGMENT: 08/29/2007
TRIAL JUDGE: HON. DAVID STRONG, JR.
COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT: MARGARET P. ELLIS
DANIEL WESLEY KITCHENS
MATTHEW WARREN KITCHENS
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: W. GLENN WATTS
NATURE OF THE CASE: CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION: PETITION FOR POST-CONVICTION
RELIEF DENIED
DISPOSITION: AFFIRMED AS MODIFIED - 07/21/2009
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

MAXWELL, J., FOR THE COURT:

¶1. Richard A. Simoneaux pled guilty to the sexual abuse of a seventy-six-year-old vulnerable adult who lived in a nursing home. He also entered guilty pleas to one count of sexual battery, two burglary-related counts, and two counts of voyeurism, which stemmed from him peeping into nursing homes and spying upon the residents.

¶2. Rather than proceed to trial, Simoneaux chose to enter guilty pleas to each count in what appears to be a package deal, complete with sentencing recommendations from the State. When questioned by the trial judge, Simoneaux offered unwavering admissions of guilt, and the trial judge accepted his guilty pleas.

¶3. Simoneaux also admitted to the court that he has had problems for a long time and pleaded for the court to help him with these problems. The trial judge sentenced Simoneaux in line with the State and Simoneaux's agreed upon recommendation to a sentence of twenty-five years' imprisonment, on the six counts of conviction with each count to run concurrently with the others.[1] Also, pursuant to the State's recommendation, the trial court ordered that

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[1] More specifically, the trial judge imposed the following sentences: (1) sexual battery-thirty years with twenty-five years to serve, day for day, and five years suspended followed by five years of post-release supervision, (2) sexual abuse of a vulnerable adult-ten years with eight years to serve and two years suspended followed by five years of post-release supervision, (3) burglary of a dwelling- twenty years followed by five years of post-release supervision, (4) attempted burglary-seven years with six years to serve and one year suspended followed by one year of post-release supervision, (5) each of the

Simoneaux be banned from Mississippi upon his release from the Mississippi Department of Corrections. Thereafter, assisted by different counsel, Simoneaux sought post-conviction relief, which the trial court denied.

¶4. Aggrieved, Simoneaux appeals, asserting essentially five issues: (1) his guilty pleas were involuntary because of insufficient factual bases and because the elements of each offense were not explained to him; (2) his counsel was constitutionally ineffective; (3) his convictions for both sexual abuse of a vulnerable adult and sexual battery violate double jeopardy; (4) the trial court's order banishing him from Mississippi is unconstitutional and illegal as applied; and (5) he is being denied his right to receive credit against his sentence for time spent incarcerated.

¶5. We affirm the trial court's denial of Simoneaux's petition for post-conviction relief on issues one, two, and three, and modify the trial court's denial of the post-conviction motion as to the banishment provision complained of in his fourth assignment of error; accordingly, we order the banishment provision stricken from his sentence. We also agree that he should be given credit for time served, as requested, but instruct Simoneaux to voice his requests to the proper authorities within the MDOC administrative system. We will address each assignment of error in turn.

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two voyeurism counts: five years with four years to serve and one year suspended followed by one year of post-release supervision. Simoneaux's sentences were ordered to run concurrently with one another.

STANDARD OF REVIEW

¶6. "[T]his Court reviews a denial of post-conviction relief under an abuse of discretion standard." *Brown v. State*, 872 So. 2d 96, 98 (¶8) (Miss. Ct. App. 2004). We will not overturn a lower court's denial of post-conviction relief unless its factual findings are clearly erroneous. *McClinton v. State*, 799 So. 2d 123, 126 (¶4) (Miss. Ct. App. 2001). However, if questions of law are raised on appeal, our standard of review is de novo. *Id.*

I. Whether Simoneaux's Guilty Pleas Were Voluntary

A. Factual Basis

¶7. It is undisputed that neither Simoneaux nor the State laid out all of the specific, detailed facts of the underlying charges when he pled guilty. However, the failure to do so does not in and of itself render a guilty plea involuntary, nor does it cause a factual showing to fail merely because the details that may be brought forth at trial are not fleshed out. *Corley v. State*, 585 So. 2d 765, 767-68 (Miss. 1991). Furthermore, our appellate courts are not limited to a mere review of the plea transcript. Instead, we are directed to review the Due to the sensitive nature of the facts of this appeal, we substitute initials for the victims to protect their privacy and maintain their anonymity. However, the names of the victims were specifically stated in both of the subject indictments. entire record to determine if a factual basis exists. *Boddie v. State*, 875 So. 2d 180, 183 (¶8) (Miss. 2004).

1. The First Indictment

¶8. Count One of the indictment in Cause No. 04-212 charged Simoneaux with sexual battery. Mississippi Code Annotated section 97-3-95 (Rev. 2006) makes clear that a person is guilty of sexual battery if: (1) he engages in sexual penetration with another person, (2) without her consent. We find that both elements are present in Count One. The count is also heavily fact laden. It charges, in pertinent part, that Simoneaux "did will[l]fully, unlawfully and feloniously engage in sexual penetration against the will and without the consent of [F.S.[2]] , a female person . . . ." The indictment also describes the manner in which Simoneaux committed the sexual battery, that is, by "willfully, unlawfully and feloniously inserting his penis into the vagina" of F.S.

¶9. Count Two charges sexual abuse of a vulnerable adult. Mississippi Code Annotated section 43-47-19(3) (Rev. 2004) instructs that "[a]ny person who willfully inflicts physical pain or injury upon a vulnerable adult, shall be guilty of felonious abuse or battery . . . ." This count is also sufficiently specific and all elements are addressed. The charging language provides that Simoneaux, "did will[l]fully, unlawfully and feloniously inflict physical pain upon [F.S.], a female born, January 26, 1928, a vulnerable adult." The manner in which Simoneaux caused physical pain to F.S., was also clearly stated.

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[2] Due to the sensitive nature of the facts of this appeal, we substitute initials for the victims to protect their privacy and maintain their anonymity. However, the names of the victims were specifically stated in both of the subject indictments.

According to the indictment, he "pull[ed] her legs apart and insert[ed] his penis into [her] vagina . . . ."

¶10. The burglary alleged in Count Three charged Simoneaux with breaking and entering into a dwelling occupied by F.S., a resident of McComb Extended Care. The method of breaking was described in detail and so was the underlying felony. Simoneaux was accused of "wil[l]fully, unlawfully, feloniously, forcibly and burglariously forcing an outer window" of McComb Extended Care, with the intent to sexually abuse and sexually penetrate F.S. There are two elements in a burglary case: (1) the burglarious breaking and entering a dwelling, and (2) the felonious attempt to commit some crime therein. *Tran v. State*, 962 So. 2d 1237, 1242 (¶19) (Miss. 2007). Both elements are clearly pled, and the count is sufficiently specific.

¶11. Simoneaux received a copy of this indictment. He was also verbally advised of the specific charges and facts giving rise to the offenses. The indictment was read to him verbatim during his arraignment and is certainly part of the record in this matter. All three counts were without question sufficiently specific enough for the trial court to determine that Simoneaux's conduct was indeed criminal. The first two counts set forth graphic details of the sexual abuse of a vulnerable adult and the sexual battery charge. The remaining burglary count is also sufficiently comprehensive.

2. The Second Indictment

¶12. A second indictment was returned in Cause No. 04-211. Simoneaux was charged in Count One with attempted burglary of a dwelling. More specifically, Count One accused Simoneaux of attempting to break into the Camellia Estates building in McComb, which was occupied and used by D.E. Count One also set forth Simoneaux's attempt to enter through a door to Room E-1A, which was occupied by D.E., with the intent to assault D.E., but his attempt failed. Again, the allegations are fact specific, and all elements are present.

¶13. As to Count Two, Simoneaux was charged with voyeurism, in violation of Mississippi Code Annotated section 97-29-61 (Rev. 2006). This section makes clear that "[a]ny person who enters upon real property whether the original entry is legal or not, and thereafter pries or peeps through a window . . . for the lewd, licentious and indecent purpose of spying upon the occupants thereof, shall be guilty of" voyeurism. Count two alleges that Simoneaux "wil[l]fully, unlawfully and feloniously" entered upon the property of Camellia Estates and once there, peeped through a window of D.E.'s residence for the lewd, licentious, and indecent purpose of spying on her. Again, the facts are specifically pled and each element of the statute is addressed.

¶14. Count Three charged Simoneaux with a separate act of voyeurism. This time Simoneaux was charged with entering a different property, McComb Nursing and Rehab, and thereafter peeping through a window of the room of A.A. and M.B. for the lewd, licentious, and indecent purpose of spying on them.

Once more, the count is fact specific and all elements are present.

¶15. Simoneaux waived arraignment on the second indictment, but admitted in the signed waiver that he had been served a copy of the indictment. He then decided to forgo trial and plead guilty to each of the six charges.

¶16. At his plea hearing, Simoneaux was placed under oath. The trial court identified the specific charges against him, and Simoneaux verified that he wanted to withdraw his not guilty pleas and to plead guilty to each of the offenses:

The Court: Your attorney has announced that you wish to withdraw the not-guilty pleas made earlier to sexual battery, sexual abuse of a vulnerable adult, burglary, attempted burglary, and voyeurism – two counts of that – and plead guilty at this time. Is that your desire?
Defendant Simoneaux: Yes, sir.

¶17. The trial judge further assured that Simoneaux reviewed the indictments, elements of each offense, discovery materials and police reports with his attorney:

The Court: Did [your attorney] go over the indictments with you and the elements of the crimes?
Defendant Simoneaux: Yes, sir.
. . . .
The Court: Did he go over the discovery materials provided by the District Attorney's file?
Defendant Simoneaux: Yes, sir.

The Court: Case reports and police reports and what not?
Defendant Simoneaux: Yes, sir.
The Court: Has he answered all of your questions?
Defendant Simoneaux: Yes, sir.

¶18. The trial judge also advised Simoneaux that he faced the maximum penalty of eighty-two years' imprisonment, which Simoneaux acknowledged that he understood. In addition, Simoneaux advised the court that he was also aware that a guilty plea to the five offenses waived his rights and placed him in a position to be sentenced to the statutory maximums. The record reflects Simoneaux assured the trial court that he was voluntarily pleading guilty:

The Court: Has anyone threatened, abused, or promised you anything to cause you to want to plead guilty?
Defendant Simoneaux: No, sir.
The Court: Are you pleading guilty because you are guilty, and for no other reason?
Defendant Simoneaux: Yes, sir.

¶19. He also acknowledged that he had been fully advised of his rights, and he was satisfied that if the case proceeded to trial, the State would be able to prove him guilty of all charges:

The Court: Are you satisfied that the State can prove beyond a reasonable doubt that you are guilty?
Defendant Simoneaux: Yes, sir.

The Court: Have you fully understood all of your rights?[3]
Defendant Simoneaux: Yes, sir.
The Court: How do you plead?
Defendant Simoneaux: Guilty.

¶20. In order for a guilty plea to be accepted, the record must contain "enough that the court may say with confidence the prosecution could prove the accused guilty of the crime charged." *Corley*, 585 So. 2d at 765. The two indictments provided detailed factual accounts of each crime, and while under oath, Simoneaux assured the trial court he had reviewed the indictments with his attorney. Concerning police investigative reports, the record excerpts provided by Simoneaux contain a "Physical Evidence Inventory," which identifies a search warrant for 1007 Old Hwy 24, the residence listed by Simoneaux as his address on his "Know Your Rights Before Pleading Form." The evidence inventory sheet reflects that the McComb Police Department recovered a footlocker, XXX photographs, panties, condoms, an 8mm reel to reel player, a XXX DVD, as well as cameras, a wig, and a machete. It also contains a reference to a taped confession. We note that Simoneaux swore to the court that before entering his guilty plea, he had reviewed the case reports and police reports with his attorney.

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[3] Simoneaux was also advised of his other constitutional rights, which he acknowledged that he understood. Because he only challenges the voluntariness of his guilty pleas, and the alleged lack of an adequate factual bases and elements, the remaining plea colloquy will not be discussed.

¶21. He also assured the court that he believed the State could prove him guilty of the following specific offenses as described by the trial court: "sexual battery, sexual abuse of a vulnerable adult, burglary, attempted burglary, and voyeurism – two counts of that . . . ." When asked by the trial judge whether he had anything to say before sentencing, Simoneaux told the judge that he has "had problems for a long time" and that he wanted help.[4]

¶22. There is little doubt that the problems Simoneaux spoke of relate to his tendency to commit sex-based offenses, or as the trial court later put it, "this tendency to do such as what you have done." In fact, during his sentencing, the judge ordered that Simoneaux receive counseling for the "sexual offenses and for the tendency to commit sexual offenses." The trial judge also mentioned the "provisions of the sex[-]offense act, that [I] am attaching to the Know-Your-Rights" form. It is also important to note that at no time during the plea hearing or sentencing did Simoneaux offer any hint of hesitancy or ever waiver from his admissions of guilt. Also, the record reflects that Simoneaux's own mother specifically requested that he be incarcerated in a "facility for sex offenders."

¶23. We are not considering a bare-bones drug indictment as we did in *Aucoin v. State*, 2007-CA-02004-COA (Miss Ct. App. March 24, 2009). Rather, the indictments to which Simoneaux pled guilty are

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[4] The record reflects that Simoneaux was already a registered sex offender in Louisiana and Mississippi as of the date of the subject guilty pleas.

almost speaking in nature. The individual counts set forth in each charging document contain a heavy dose of the graphic facts underlying each count. Furthermore, the record reflects that the trial judge specifically asked Simoneaux if he had reviewed these very indictments with his attorney, and Simoneaux assured the judge that he had. The trial court and Simoneaux were both satisfied that the State could prove Simoneaux guilty beyond a reasonable doubt. There were no amendments to either indictment, nor were any superseding indictments returned by the grand jury. There is simply nothing in the record that would even permit the slightest inference that either Simoneaux or the trial court believed that Simoneaux was pleading guilty to some other unnamed or uncharged conduct.

¶24. Considering the record as a whole, as we are instructed to do, Simoneaux's assurances to the trial judge that he had reviewed the two factually-specific indictments and discovery with his lawyer, along with his unwavering declaration of guilt to each of the specific crimes during his plea hearing, and his exchange with the trial judge about his sex-related problems, tendencies, and need for help, we simply cannot find that the trial court erred in denying Simoneaux's petition for post-conviction relief on this ground.

B. The Elements of the Offense

¶25. Next, Simoneaux claims his guilty pleas were involuntary because there was no proof in the record that the elements of the offenses for which he was charged were ever explained to him. Simoneaux cites

our decision in *Jones v. State*, 936 So. 2d 993 (Miss. Ct. App. 2006) in support of his argument. In *Jones*, we reversed a trial court's denial of a motion for postconviction relief sought by a defendant who claimed his guilty plea was not voluntarily, knowingly, and intelligently entered because he claimed he was not informed of the elements of the offense. *Id.* at 994 (¶3). However, *Jones* appears to be limited to situations in which "boilerplate language in a plea petition" is used to attempt to show that a defendant understood the nature and elements of the crime for which he is admitting guilt. *Id.* at 998 (¶19).

¶26. The specific question in *Jones*, was "may 'counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty' . . . be shown by form language in a plea petition, that is not confirmed by questioning in the hearing and appears on a petition in which the elements of the offense are not stated?" *Id.* at 997 (¶14). Our answer was no. *Id.* at 998 (¶19).

¶27. In *Jones*, we held that based on the United States Supreme Court's reasoning in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), the boilerplate assurance in a plea petition is not enough. *Id.* Instead, during a plea hearing, "a trial court must assure itself that a defendant understands the nature and elements of the crime for which he is admitting guilt." *Id.* at 994 (¶6) (citing *Stumpf*, 545 U.S. at 183) (internal citations omitted).

¶28. In the present case, during his change of plea hearing, the trial court assured, through questioning at the plea hearing, that the charges and elements of each offense were explained to Simoneaux by his attorney and that Simoneaux understood the charges:

The Court: Did [your lawyer] go over the indictments with you and the elements of each crime.
Defendant Simoneaux: Yes, sir.
The Court: Do you understand the elements of the crimes?
Defendant Simoneaux: Yes, sir.

¶29. The United States Supreme Court has "never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Stumpf*, 545 U.S. at 183. Here, we are not considering a boilerplate plea petition like we did in *Jones*. Instead, we are faced with specific, sworn-to-on-the-record assurances by Simoneaux to the court that he not only reviewed the indictment with his attorney, but that his attorney also explained the elements of each crime to him. It has long been held that "[s]olemn declarations in open court carry a strong presumption of verity." *Baker v. State*, 358 So. 2d 401, 403 (Miss. 1978). Accordingly, we find the trial court did not err in accepting Simoneaux's sworn declaration that he understood the elements of the charged offenses.

II. Whether Simoneaux's Counsel was Constitutionally Ineffective

¶30. For Simoneaux to establish an ineffective assistance of counsel claim, he must demonstrate: (1) his attorney's performance was deficient and (2) this deficiency deprived him of a fair trial. *Beene v. State*, 910 So. 2d 1152, 1155 (¶10) (Miss. Ct. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We are instructed to assess the totality of the circumstances in determining whether counsel's assistance was effective. *Wiley v. State*, 750 So. 2d 1193, 1199 (¶11) (Miss. 1999). There is a strong, but rebuttable, presumption that an attorney's performance falls within the wide range of reasonable professional assistance. *Rankin v. State*, 636 So. 2d 652, 656 (Miss. 1994). To establish prejudice, the claimant must demonstrate that, but for his attorney's errors, there is a reasonable probability that a different outcome would have occurred. *Id.*

¶31. Simoneaux argues that his original counsel was deficient because he: (1) failed to file certain pretrial motions, (2) failed to adequately investigate conflicting evidence, and (3) allowed him to plead guilty when no factual bases were established.

¶32. Simoneaux asserts that various motions for discovery, to require independent forensic testing, and to quash the indictment on double jeopardy grounds should have been filed by counsel. He claims that his attorney's failure to file such motions rendered him ineffective. The supreme court has instructed, "'counsel's failure to file certain motions,

call certain witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy' and do not give rise to an ineffective assistance of counsel claim." *Pruitt v. State*, 807 So. 2d 1236, 1240 (¶8) (Miss. 2002) (quoting *Cole v. State*, 666 So. 2d 767, 777 (Miss. 1995)). Simoneaux's attorney heard testimony from a victim at a preliminary hearing and reviewed the discovery with Simoneaux. Based on his client's acknowledgment of guilt and the reprehensible nature of the crimes charged, it was well within his attorney's discretion to size up the evidence and decide rather than file a litany of motions, that an early guilty plea to a package deal, which resolved each offense and contained an agreed upon recommendation for a twenty-five-year sentence best served his client's interests. The trial court even questioned Simoneaux about his attorney's course of conduct, and Simoneaux maintained that his attorney had answered all of his questions and that he was satisfied with his attorney's representation. Therefore, we find that Simoneaux's attorney's decision to forgo motion practice in lieu of plea negotiations was neither deficient nor prejudicial.

¶33. Simoneaux next argues that his attorney's performance was deficient because he failed to properly investigate allegedly conflicting evidence. This contention is based primarily on a sexual assault information sheet, which appears to be filled out by F.S.'s attending physician and nurse. There are two boxes on the form next to the question, "[w]as there penetration of vagina." The information sheet requires the medical provider to check either "attempted" or "successful." Here the "attempted"

box is checked.[5] Simoneaux argues that because sexual battery requires penetration, and because a description of the assailant differed from Simoneaux's alleged appearance, that "had this conflicting evidence been investigated and presented to the trial court, a conviction would have been less likely."

¶34. In making this claim about the medical records, Simoneaux fails to point out that the medical records also contained information that could reasonably be viewed as detrimental to his defense. In fact, the seventy-six-year-old victim told a law enforcement officer that she was "*raped*" while in the nursing home, and that her attacker "put his hand over [her] mouth and told [her] not to scream." In addition, she described in detail how her attacker caused pain to her right thigh "from where he made [her] spread her legs." The limited record excerpts provided by Simoneaux also show that a medical doctor diagnosed the victim as having suffered a sexual assault and urinary infection. We find that these documents potentially cut both ways.

¶35. In support of his ineffective assistance claim, Simoneaux cites the supreme court's decision in *Hannah v. State*, 943 So. 2d 20 (Miss. 2006). In *Hannah*, the defendant pled guilty to manslaughter, a charge which stemmed from the death of her husband as a result of someone pouring boiling water on him. *Id.* at 23 (¶3). After pleading guilty, Hannah later filed for post-conviction relief, claiming her plea was involuntary and that her counsel was ineffective.

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[5] The record is unclear as to whom checked the box.

Id. at 24 n.1. The trial court denied her petition for post-conviction relief, which was based in part on an allegation that her counsel should have investigated a statement by the victim, claiming his attacker was "another woman." *Id.* at 24-25 (¶¶2, 8).

¶36. *Hannah* is readily distinguishable from the present case on at least two grounds. First, in *Hannah*, during the change of plea proceeding, when asked if she agreed with the evidence against her, the defendant stated, ". . . no, I didn't. But yeah, I heard what he said." *Id.* at 26 (¶14). Although, the defendant eventually admitted her guilt after a short recess, the supreme court found the voluntariness of her plea was in doubt. *Id.* at 27 (¶19). Second, "Hannah continued to maintain during sentencing that she was not guilty and offered speculation as to who might have thrown the boiling water on the victim." *Id.* at 27 (¶17). Here, Simoneaux did not offer a hint of hesitancy at any time during his plea hearing or sentencing, nor did he attempt to blame the crime on an other individual. Instead, he readily admitted his guilt and informed the trial court that he has "had problems for a long time." He even asked the trial court to provide help for his issues.

¶37. Though Simoneaux faced over eighty-years' imprisonment, his attorney was able to negotiate a recommendation for what he described as a "flat sentence" of twenty-five years' imprisonment. This package deal required that each count run concurrently to the next and resolved all six offenses. Simply put, Simoneaux's attorney may have saved him from possibly spending the rest of his life in prison. When the potential lengthy term of

incarceration is considered in totality with his attorney's failure to make hay out of a couple of possibly helpful, but potentially damning, medical records, we cannot find that Simoneaux's attorney's performance was deficient. Nor can we conclude that by voluntarily entering a package plea agreement that Simoneaux was deprived of a fair trial.

¶38. Simoneaux finally argues that his counsel was ineffective for allowing him to plead guilty when no factual bases for his pleas existed. Having concluded the trial court did not err in denying his requested post-conviction relief on this ground, we find no merit to this claim.

III. Whether Convictions for Sexual Abuse of a Vulnerable Adult and Sexual Battery Constitute Double Jeopardy

¶39. To determine whether sexual abuse of a vulnerable adult encompasses the crime of sexual battery, we must examine the law regarding double jeopardy, the statutes at issue, and the respective language in the charging documents. The Fifth Amendment to the United States Constitution protects an accused against double jeopardy and is enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Article 3, section 22 of the Mississippi Constitution guarantees that no person "shall be twice placed in jeopardy for the same offense . . . ." This Court has previously held that:

Double Jeopardy consists of three separate constitutional protections. *White v. State*, 702 So. 2d 107 [,109 (¶9)] (Miss. 1997). "It protects against a

second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Id.* "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, *the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.*" *Blockburger v. [United States]*, 284 U.S. 299 . . . (1932). *Jordan v. State*, 936 So. 2d 368, 374 (¶32) (Miss. Ct. App. 2005) (emphasis added).

¶40. Recently, in *Branch v. State*, 998 So. 2d 411, 416 (¶20) (Miss. 2008), the supreme court considered whether an indictment that charged both the lustful touching of a child under fourteen years of age and statutory rape violated double jeopardy. The supreme court found that they did not. *Id.* at 418 (¶28). In analyzing the two crimes, the court considered the elements of each offense and found that the crime of statutory rape required proof of additional elements: The crime of gratification of lust does not require any proof of sexual intercourse or proof of a laceration/tearing of the child's genitalia. As such, statutory rape requires proof of an additional element not required by gratification of lust. Pursuant to *Jordan v. State*, there is no double jeopardy in this case because statutory rape requires proof of an additional fact. *See Jordan v. State*, 936 So. 2d 368 (Miss. Ct. App. 2005). Therefore, the trial court properly denied Branch's motion for a directed verdict, as the crime of statutory rape does not encompass the crime of gratification of lust. *Id.*

¶41. Likewise, in the current case, the crime of abuse of a vulnerable adult and the crime of sexual battery require additional and different elements of proof. Mississippi Code Annotated section 97-3-95(1)(a) (Rev. 2006) provides in pertinent part: (1) A person is guilty of *sexual battery* if he or she engages in sexual penetration with: (a) Another person without his or her consent . . . .(Emphasis added).

¶42. Whereas, the Mississippi Vulnerable Adults Act provides that "[a]ny person who willfully inflicts physical pain or injury upon a vulnerable adult shall be guilty of felonious abuse or battery, or both, of a vulnerable adult . . . ." Miss. Code. Ann. § 43-47-19(3). This Act defines abuse to include the "nonaccidental infliction of physical pain, injury or mental anguish on a vulnerable adult," including "sexual abuse." Miss. Code Ann. § 43-47-5(a) (Supp. 2008). Mississippi Code Annotated section 43-47-5(n) (Supp. 2008) defines the term "vulnerable adult" as:
a person . . . whose ability to perform the normal activities of daily living or to provide for his or her own care or protection from abuse, neglect, exploitation or improper sexual contact is impaired due to . . . the infirmities of aging. The term "vulnerable adult" also includes all residents or patients, regardless of age, in a care facility for the purposes of [s]ections 43-47-19 and 43-47-37 only.

¶43. In examining the two complained of charges, we note that each offense contains an element lacking in the other. Like *Branch,* here the charged crimes require different elements of proof, namely penetration. *Branch,* 998 So. 2d at 418 (¶28). The

crime of abuse of a vulnerable adult does not require proof of *penetration*. Miss. Code. Ann. § 43-47-19(3). But the crime of sexual battery does require this extra element. Miss. Code Ann. § 97-3-95 (1). Additionally, abuse of a vulnerable adult requires proof that the defendant willfully inflicted *physical pain or injury* upon a vulnerable adult. Miss. Code. Ann. § 43-47-19(3). Where sexual battery has no such requirement. Miss. Code Ann. § 97-3-95. The differences do not stop there. The crime of sexual battery does not require that the victim's abilities to provide for his or her protection from sexual contact be impaired by "the infirmities of aging" or under the alternatively-charged definition applicable here -- that the person is a patient or resident, of a care facility. Miss. Code Ann. § 43-47-5(a), (n). Clearly, the charge of abuse of a vulnerable adult requires this additional element. Miss. Code. Ann. § 43-47-19(3).

¶44. While both offenses stem from the same act, we find that because the charges require different elements of proof there is no double jeopardy violation

IV. Whether the Banishment Provision in Simoneaux's Sentence Is Unconstitutional and Illegal As Applied

¶45. Simoneaux claims the trial court rendered an unconstitutional and illegal sentence when it ordered that he be banished from Mississippi upon his release from prison. Although he argues there is nothing in the record to justify the sentence, he neglects to point out that the banishment provision

was part of what appears from the record to be an agreed upon sentencing recommendation to the trial court.

¶46. Initially, the State recommended the various terms of imprisonment for each count. The prosecutor then advised the court, "[a]lso, the same recommendations -- get Mental Health evaluation, follow it, be ordered to follow it, and leave the State of Mississippi upon the completion of his sentence." Simoneaux did not object to the banishment recommendation. Instead, his main concern appeared to be making sure the court was aware of the State's agreement to make a sentencing recommendation of twenty-five years, with all six counts to be served concurrently. As his defense attorney put it, "just for the record, we summed this up as a 25-year flat sentence."

¶47. In response to the trial court's request that Simoneaux's attorney advise him about the requirement that he register as a sex offender, the following exchange occurred:

The Court: The Mississippi Code requires on a sex offender that a copy of the Code be attached to your Know-Your-Rights. And to make sure we do everything right, Mr. Luckett, if you would, go over the provisions with him and then attach it to it and then bring him back.
Mr. Luckett: The ex offender, yes sir. He is already registered in both states.
The Court: He is?
Mr. Luckett: Is that right, Mr. Simoneaux?
Defendant Simoneaux: Louisiana and Mississippi.

The Court: Go over ours with him again and then bring himback.

¶48. Also, before sentencing, Simoneaux told the court, "I have had problems for a long time, and I would greatly appreciate as much help for myself as possible, prior to my release and after my release from MDOC." In fashioning an appropriate remedy, the court ordered that Simoneaux be examined by a psychiatrist at the MDOC and that "he receive such psychiatric care as available to him for sexual offenses and for the tendency to commit sexual offenses." The trial court then ordered that upon Simoneaux's release, he be banned from the State of Mississippi. Neither Simoneaux nor his attorney objected to this request. Indeed, Simoneaux's only response was whether he would have time to settle his affairs in Mississippi before he was banished.

¶49. We acknowledge that Mississippi appellate courts have held banishment to be permissible. *See Cobb v. State*, 437 So. 2d 1218, 1220 (Miss. 1983) (affirming the probation condition that defendant stay at least 125 miles away from Stone County), *Watts v. State*, 1 So. 3d 886, 887, 889-90 (¶¶2, 10) (Miss. Ct. App. 2008), *cert. denied*, 999 So. 2d 1280 (Miss. 2009) (banishment from 100 miles of Forrest County Courthouse affirmed). However, in crafting banishment provisions, trial courts are required to make on the record findings that the banishment bears a reasonable relationship to the probation and that the ends of justice and best interests of the defendant and the public would be served by this punitive measure. *Hamm v. State*, 758 So. 2d 1042, 1047 (¶14) (Miss. App. 2000). Also, trial judges must

make certain that public policy is not violated and that the rehabilitative purpose of probation is not defeated. *Id.*

¶50. Though it appears from the record that Simoneaux's banishment from Mississippi was part of an agreed upon sentencing recommendation, the practice of dumping defendants on other jurisdictions has been held improper by the Mississippi Supreme Court and federal courts on public policy grounds. *See McCreary v. State*, 582 So. 2d 425, 427-28 (Miss. 1991); *United States v. Abushaar*, 761 F.2d 954, 959-60 (3rd Cir. 1985).

¶51. While banishing Simoneaux from Mississippi would perhaps provide a degree of protection to the citizens of our state, we certainly do not want our sister states repaying us for the favor. Accordingly, we find the reasoning in *McCreary* and *Abushaar* applicable and order the banishment provision stricken from Simoneaux's sentence. The other provisions of his concurrent sentences shall remain in full effect.

V. Whether Simoneaux Is Entitled to Credit Against His Sentence for Time Spent Incarcerated

¶52. Time spent in incarceration pending conviction should be applied to a defendant's sentence. Mississippi Code Annotated § 99-19-23 (Rev. 2007) provides: The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or

on any sentence finally set after all avenues of appeal are exhausted.

¶53. While we agree that Simoneaux should receive credit for time served prior to the imposition of his sentence, "a post-conviction relief pleading is not the proper means to calculate and receive credit for the initial . . . time served." *Murphy v. State*, 800 So. 2d 525, 527 (¶10) (Miss. Ct. App. 2001). Simoneaux "should send such requests to the proper authorities within the Mississippi Department of Corrections[']s administrative system. If he is denied the proper relief, or credit for time served, by the administrative system, he should then turn to the courts to seek remedy." *Id.* at 527-28 (¶10). This allegation of error is without merit.

¶54. Accordingly, we affirm the trial court's denial of Simoneaux's motion for postconviction relief on each asserted ground with the exception of the banishment provision of the sentencing order, which we strike.

¶55. THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY DENYING THE PETITION FOR POST-CONVICTION RELIEF IS AFFIRMED AS MODIFIED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO PIKE COUNTY. LEE AND MYERS, P.JJ., AND ISHEE, J., CONCUR. IRVING, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., GRIFFIS AND BARNES, JJ., AND JOINED IN RESULT ONLY BY CARLTON, J.

IRVING, J., SPECIALLY CONCURRING:

¶56. I agree that the judgment of the circuit court should be affirmed. I write separately, however, to point out that, in my opinion, this Court is being inconsistent in applying the law in post-conviction collateral relief cases where there is a challenge to the factual basis undergirding the plea, thereby giving the impression that the Court is result oriented. Our recent opinion in *Aucoin v. State*, 2007-CA-02004 (Miss. Ct. App. Mar. 24, 2009) aptly illustrates my point. There, we reversed the judgment of the Circuit Court of Lincoln County which denied Corey Aucoin's post-conviction relief motion that sought to overturn his guilty plea because of the absence of a factual basis. *Id.* at (¶¶6, 17). In doing so, we specifically found that "no factual basis existed for any of Aucoin's guilty pleas." *Id.* at (¶17). Consequently, we set aside Aucoin's guilty pleas and remanded the case to the active trial docket of the Lincoln County Circuit Court. *Id.*

¶57. In my opinion, the facts in *Aucoin* argue at least as forcibly as do the facts here, if not more so, for the existence of a factual basis. Yet, six members of this Court found in *Aucoin* that a factual basis was lacking. I am unable to discern why the facts here are pregnant while the facts in *Aucoin* are barren. In any event, it is my view, as it was in *Aucoin*, that there is no basis for setting aside the judgment of the circuit court denying post-conviction relief, as I believe here, as I did there, that there are sufficient facts to establish the existence of a factual basis. For the reasons stated, I specially concur with the majority opinion.

ROBERTS, J., DISSENTING:

¶58. This case is another post-conviction relief proceeding in which this Court must determine whether an adequate factual basis exists in the record of the plea hearing to support the circuit court's acceptance of the defendant's felony guilty pleas. After a thorough and meticulous review of the entire record before the circuit court judge when he accepted Richard Simoneaux's six guilty pleas, I cannot conclude that there was a sufficient factual basis to conclude that Simoneaux's conduct fell "within the ambit of that defined as criminal." Because the majority declines to recognize this innate deficiency and affirms the summary denial of Simoneaux's motion for post-conviction relief, I respectfully dissent.

¶59. "Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea." URCCC 8.04(A)(3). A defendant *may* establish a factual basis for his guilty plea by pleading guilty; however, "the admission must contain factual statements constituting a crime or be accompanied by independent evidence of guilt." *Hannah v. State*, 943 So. 2d 20, 26-27 (¶16) (Miss. 2006). In other words, "a factual basis is not established by the mere fact that a defendant enters a plea of guilty." *Id.* at 27. Rather, the record must contain those facts which are "sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal." *Lott v. State*, 597 So. 2d 627, 628 (Miss. 1992) (quoting *United States v. Oberski*, 734 F.2d

1030, 1031 (5th Cir. 1984)). Finally, this Court is not limited to a review of a defendant's plea transcript when determining if a factual basis existed for his guilty plea, but we may review the record as a whole for evidence of such. *Boddie v. State*, 875 So. 2d 180, 183 (¶8) (Miss. 2004).

¶60. Similar to Rule 8.04, Rule 11 of the Federal Rules of Criminal Procedure requires a district court judge, "[b]efore entering judgment on a guilty plea, . . . [to] determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). This requirement is designed "to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy v. United States*, 394 U.S. 459, 467 (1969). The same reasoning applies to our Rule 8.04(A)(3).

¶61. The majority finds a factual basis sufficient to support Simoneaux's six guilty pleas. The majority bases its finding on the totality of the following circumstances: (1) during the guilty plea hearing, Simoneaux assured the circuit court judge that he and his attorney reviewed the two three-count indictments; (2) the indictments were "factually specific"; (3) during the guilty plea hearing, Simoneaux assured the circuit court judge that he had reviewed the discovery with his attorney; (4) Simoneaux's "steadfast" declarations of guilt to "specifically addressed" crimes during the hearing; and (5) Simoneaux's exchange with the circuit court judge regarding "sex-related problems, tendencies, and need for help."

¶62. It is true that Simoneaux responded affirmatively when the circuit court judge asked him whether he had reviewed the two three-count indictments with his attorney. Be that as it may, Simoneaux's affirmative response to that question does not fulfill the requirement that the record contain facts which are "sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal." *Lott*, 597 So. 2d at 628. The circuit court judge did not ask Simoneaux any questions about the underlying facts of any of the six charges. Simoneaux never testified that he actually did anything in particular.

¶63. Additionally, the following matters illustrate the factual deficiencies that exist in the record which cause me to conclude that there was not an adequate factual basis in the record to justify accepting Simoneaux's guilty pleas. Simoneaux never admitted that he committed any crimes in Pike County, Mississippi, or anywhere else in the Fourteenth Circuit Court District. Simoneaux was charged with attempted burglary. Mississippi Code Annotated section 97-1-7 (Rev. 2006) sets forth, in part, that a defendant may be convicted for attempting to commit an offense if that person commits "any overt act toward the commission" of the incomplete offense. There was no evidence that Simoneaux committed an "overt act" constituting an attempt to commit a burglary. There is nothing in the record that sheds light on what that overt act might have been. Did Simoneaux simply attempt to open a locked door? Did he attempt to pick a lock? Did he attempt to pry

open the door? The record contains no answers to these questions.

¶64. Simoneaux was charged with two counts of criminal voyeurism. The record contains no specific evidence that Simoneaux "peeped" into a window. Likewise, the record contains no specific facts to conclude that Simoneaux peeped into a window "for the lewd, licentious[,] and indecent purpose of spying upon the occupants thereof." *See* Miss. Code Ann. § 97-29-61 (Rev. 2006).

¶65. In the second indictment, Simoneaux was charged with sexual battery. The record contains no evidence that there was sexual penetration, which is an element of sexual battery pursuant to Mississippi Code Annotated section 97-3-95(1) (Rev. 2006). Simoneaux was also charged with abuse of a vulnerable adult in violation of Mississippi Code Annotated section 43-47-19(3) (Rev. 2004); the indictment charged that Simoneaux inflicted "physical pain upon [F.S.], . . . a vulnerable adult, by pulling her legs apart and inserting his penis into [her] vagina." There was no evidence that F.S. was a "vulnerable adult." One may speculate that F.S. was a resident of a nursing home and, therefore, a vulnerable adult pursuant to Mississippi Code Annotated section 43-47-5(n) (Supp. 2008), but no evidence of her status was presented by anyone. A subsequent charge in the indictment alleges that F.S. was a resident of the nursing home, but the indictment was not read during the guilty plea hearing, and there was no other evidence that F.S. was actually a resident of the nursing home. Finally, Simoneaux was charged with burglary, but there

was no evidence to support a factual basis for breaking and entering, much less any evidence that Simoneaux had the intent to commit a crime once he made his way inside.

¶66. As for the majority's reliance on the indictments as being "factually specific," the two indictments *were not read* during Simoneaux's guilty plea hearing. In *Drake v. State*, 823 So. 2d 593, 594 (¶3) (Miss. Ct. App. 2002), this Court found that there was a sufficient factual basis to support a guilty plea because the circuit court judge "questioned Drake extensively about the crimes with which he was charged" and "had the indictment read to Drake and Drake responded that he wanted to plead guilty to all three counts as they were read to him." Here, the circuit court judge did not question Simoneaux extensively about the crimes he was alleged to have committed. Likewise, the circuit court judge did not have the indictments read to Simoneaux. As *Drake* emphasized, those events took place "[d]uring [Drake's] plea colloquy." *Id.*

¶67. It appears that the majority finds a sufficient factual basis for a guilty plea simply because a defendant had previously received a copy of an indictment. Rule 8.01 of the Uniform Rules of Circuit and County Court requires that "[p]rior to arraignment a copy of the indictment must be served on the defendant." Surely simple receipt of an indictment is not sufficient to establish a factual basis for a guilty plea. If that were true, then a factual basis for a subsequent plea would be established prior to arraignment. Furthermore, an indictment must be read to a defendant during an

arraignment. URCCC 8.01. If receipt of an indictment, "factually specific" or otherwise, establishes a factual basis for a plea, then by extension there could be a factual basis for a guilty plea when a defendant pleads "not guilty" during an arraignment and later opts to plead guilty. The same reasoning applies where, as with the second indictment against Simoneaux, a defendant *waives arraignment* and pleads not guilty. I cannot concur with the majority's reasoning that receipt of a copy of an indictment, "factually specific" or otherwise, is sufficient to establish a factual basis for six guilty pleas where those indictments are not read to the defendant during the guilty plea colloquy. As stated in *Drake*: The purpose of the factual[-]basis rule is to "push the court to delve beyond the admission of guilty [sic] lying on the surface and determine for itself whether there is substantial evidence that the petitioner did in fact commit those crimes he is charged with and is not entering the plea for some other reason that the law finds objectionable." *Id.* at (¶5) (quoting *Gaskin v. State*, 618 So. 2d 103, 106 (Miss. 1993)). With complete respect for the majority, the circuit court simply did not fulfill that obligation.

¶68. Regarding the majority's reliance on Simoneaux's affirmative response to being asked whether he reviewed the discovery with his attorney, neither the guilty plea colloquy nor the record contains any specific indication that there was any discovery in this case. While the circuit court judge asked Simoneaux a generic question intended to determine whether Simoneaux reviewed the discovery with his attorney, there is no particular indication that there was any discovery, much less

what that discovery might have been. The majority references that Simoneaux's record excerpts contain a document titled as a "Physical Evidence Inventory" which itemizes things that were purportedly recovered from Simoneaux's residence, including a reference to a taped confession. Although the majority does not suggest that those articles or the generic reference to a taped confession provide a factual basis for Simoneaux's six guilty pleas, it bears mentioning that none of those articles provide any factual basis for Simoneaux's guilty pleas. The record contains no confession, taped or otherwise, and there is no indication that the circuit court ever reviewed an alleged confession. Additionally, the majority refers to Simoneaux's affirmative response to the circuit court's question whether Simoneaux reviewed case reports and police reports with his attorney. Again, the majority does not claim that Simoneaux's affirmative response somehow creates a factual basis for his guilty pleas; however, to the extent that the majority implies as much, it is noteworthy that the record contains no specific factual reference, at the guilty plea hearing or otherwise, to any police reports or case reports, much less anything that can be remotely construed as a factual basis for Simoneaux's guilty pleas. The first time this "Physical Evidence Inventory" sheet appears in the record is as an exhibit to Simoneaux's motion for post-conviction relief. No evidence exists whatsoever that it was presented to or considered by the circuit court judge at or before the time he accepted Simoneaux's guilty pleas.

¶69. The next basis cited by the majority for its conclusion that there was a factual basis for

Simoneaux's six guilty pleas is Simoneaux's "unwavering declaration of guilt to each of the specific crimes during his plea proceeding." For brevity's sake, I will not revisit the actual deficiencies in each count. Suffice it to say, the matters discussed above illustrate that the crimes were not specifically addressed in the record. Respectfully, I am unable to discern any point at which the circuit court addressed any specific crime during the guilty plea hearing, and the majority does not refer to any particular point in the record to support its finding that Simoneaux admitted guilt to any particular crime.

¶70. The transcript of the six guilty pleas presently at issue encompasses eleven pages of the record. During those guilty pleas, no one recited the facts and circumstances under which Simoneaux committed any of the six crimes. The only references that even remotely touch on a factual basis whatsoever for Simoneaux's guilty pleas during the hearing occurred when the circuit court judge asked Simoneaux whether his attorney had explained the elements of the crimes to which he was pleading guilty, whether he was pleading guilty because he was guilty and for no other reason, and whether he was satisfied that the prosecution could prove beyond a reasonable doubt that Simoneaux was guilty – presumably of all six charges. Simoneaux responded affirmatively to all three questions. However, those questions, and the responses to those questions, could only be described as generalized and non-specific. The circuit court judge never asked Simoneaux to elaborate on the factual details of any of the six offenses alleged in the two indictments.

¶71. There are many ways to establish a sufficient factual basis for a guilty plea. A factual basis for a guilty plea has been found when third parties discuss the evidence against a defendant. For example, there may be a sufficient factual basis to support a defendant's guilty plea when both a defendant and an investigator for the prosecution testify to factual matters during a guilty plea hearing. *Brown v. State*, 533 So. 2d 1118, 1124 (Miss. 1988). Similarly, a prosecutor's "concise statement of facts to establish the crime, the investigation, and the apprehension of" a defendant during a guilty plea has been found to aid in establishing a sufficient factual basis to support a guilty plea. *Reynolds v. State*, 521 So. 2d 914, 917 (Miss. 1988). A defense attorney's "lengthy recitation of the evidence against" a defendant during a guilty plea may establish a sufficient factual basis to support a guilty plea. *Jones v. State*, 970 So. 2d 1316, 1322 (¶20) (Miss. Ct. App. 2007). Nothing similar occurred during Simoneaux's guilty plea hearing. Neither the prosecution nor anyone else ever summarized or explained the evidence that would be presented if Simoneaux opted to proceed to trial.

¶72. There are still other ways to establish a sufficient factual basis to support a defendant's guilty plea. Factual proceedings already before a circuit court may establish a factual basis to support a defendant's guilty plea. For example, in *Corley v. State*, 585 So. 2d 765, 767 (Miss. 1991), the supreme court found that there was a sufficient factual basis for a guilty plea where the circuit court conducted a preliminary hearing during which the prosecution

offered substantial proof of a defendant's guilt. There appears to have been a preliminary hearing in this case, but there is no indication that, during that hearing, there was a substantial offer of proof of Simoneaux's guilt to any of the six charges. To the contrary, according to Simoneaux's motion for post-conviction relief, Simoneaux and his mother were present during a preliminary hearing at which the alleged victim of sexual battery testified under oath that she "recalled a man coming into her room and *attempting* to rape her" and that she could not identify her attacker. While I do not weigh the truthfulness of Simoneaux's statement, it bears mentioning to the extent that there is certainly no basis to conclude that, based on statements or events at a preliminary hearing, there is a factual basis for Simoneaux's six guilty pleas.

¶73. Finally, I fail to understand how the majority can conclude that Simoneaux's statements about past problems and his mother's request that he be incarcerated in a facility for sex offenders somehow cures the defective lack of essential facts. While one might presume that Simoneaux's long-time problems are indirectly related to the charges Simoneaux faced, there is no direct relation between Simoneaux's long time problems and the conduct alleged in the indictments. At best, it requires conjecture and speculation to link the conduct alleged in the two three-count indictments against Simoneaux and his broad statements about past problems. Suffice it to say, Simoneaux's generalized reference to "problems" and his generic reference to having had those problems "for a long time" fail to

qualify as facts which are "sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal." *Lott*, 597 So. 2d at 628. If generic references to requests for help or problems in one's past creates a sufficient, actual basis for a guilty plea, then the factual basis requirement is, by extension, effectively eliminated when a defendant reaches out to our courts, has prior convictions, or even has problematic criminal thoughts that have not been acted upon.

¶74. The majority also reasons that there was a factual basis for Simoneaux's six guilty pleas because Simoneaux responded affirmatively when the circuit court asked him whether he was satisfied that the prosecution could prove his guilt and the circuit court was satisfied that the prosecution could prove Simoneaux's guilt. There was no indication that Simoneaux entered a best-interest guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and as previously mentioned, the prosecution did not discuss what evidence the State would present or how it planned to prove Simoneaux's guilt on all six charges if Simoneaux maintained his not guilty pleas and exercised his right to a trial.

¶75. Recently, this Court has found insufficient factual bases for guilty pleas under similar circumstances. In *Carreiro v. State*, 5 So. 3d 1170, 1172 (¶7) (Miss. Ct. App. 2009), this Court found that there was insufficient factual basis for a guilty plea where the record did not include a recitation of the facts and circumstances under which the

defendant allegedly committed any crimes, and the only references that even touched on a factual basis whatsoever for the pleas during the colloquy was the circuit court's inquiry and subsequent affirmative responses regarding whether the defendant's attorney explained the elements of the crimes to which he was pleading guilty to and whether the defendant believed the State could prove his guilt beyond a reasonable doubt. This Court reached a similar conclusion in *Aucoin v. State*, 2007-CA-02004-COA (¶12) (Miss. Ct. App. Mar. 24, 2009). The guilty plea hearings in both *Carreiro* and *Aucoin* were preceded by execution of the same "know your rights" form and were conducted by the same circuit court judge, who also conducted Simoneaux's guilty plea hearing. The majority neither distinguishes Simoneaux's case from *Carreiro*, nor specifies why we should not apply stare decisis to this case. At one point, the majority states that this Court is "not considering a bare-bones drug indictment as we did in *Aucoin*." To the extent that the majority's statement can be taken as an attempt to distinguish *Aucoin*, I respectfully disagree and find *Aucoin* indistinguishable. In *Aucoin*, just as in the case presently before us, the circuit court never asked Simoneaux to elaborate on the factual details of any of the offenses alleged in the two indictments. *Aucoin*, 2007-CA-02004-COA (¶12).

¶76. The requirement of a factual basis for a defendant's guilty plea is not a mere formality of the plea process, but it is required as part of a "constitutionally valid and enforceable decision to plead guilty." *Carter v. State*, 775 So. 2d 91, 98 (¶28) (Miss. 1999) (quoting *Lott*, 597 So. 2d at 628). A

circuit court is *required* to ensure that a factual basis for a defendant's guilty plea exists *in the record*. A defendant waives his constitutional right to remain silent when he pleads guilty. It is not an unreasonable burden for a circuit judge, as a preliminary matter to accepting a guilty plea, to require that a defendant detail exactly what he or she did that constitutes the crime to which the defendant is pleading guilty. Should a defendant fail or refuse to admit sufficient facts for the circuit court to conclude that the defendant committed the crime for which he or she is accused, the circuit court must either refuse to accept the guilty plea or fully satisfy the requirements of an *Alford* best-interest plea. Therefore, assuming Simoneaux did, in fact, commit the offenses referenced in the two three-count indictments, I find that behavior despicable, horrendous, and morally reprehensible in every sense. Even so, in my opinion, the facts preserved in the record presently before this Court simply do not establish, by any standard, that Simoneaux committed any of the felonies charged in the indictments.

¶77. In this case, there were no facts elicited during a preliminary hearing, no petitions to plead guilty, no reading of the indictments during the plea hearing, no introduction or reference to incriminating statements, no recitation of the evidence expected to be presented if Simoneaux did not plead guilty, no specific factual details presented by Simoneaux, and no questioning by the circuit court as to those facts. The Mississippi Supreme Court has held that the rule requiring a factual basis for a guilty plea is to be taken "seriously." *Corley*,

585 So. 2d at 766. All things considered, I cannot find that a factual basis existed for any of his guilty pleas. I would reverse the circuit court's decision to deny Simoneaux's petition for post-conviction relief, set aside his guilty pleas, and remand these charges to the active trial docket of the Pike County Circuit Court. Simoneaux should be returned to the status he occupied immediately before he pled guilty, i.e., that of an indicted and accused defendant. Accordingly, I respectfully dissent.

KING, C.J., GRIFFIS AND BARNES, JJ., JOIN THIS OPINION. CARLTON, J., JOINS THIS OPINION IN RESULT ONLY.

IN THE CIRCUIT COURT OF PIKE COUNTY, MISSISSIPPI

RICHARD SIMONEAUX

v.

STATE OF MISSISSIPPI

CAUSE NUMBER 2007-166-PCS

ORDER DENYING POST-CONVICTION RELIEF

THIS CAUSE came this day on hearing for Post-Conviction Relief, pursuant to §99-39-1 of the Mississippi Code, Annotated, the Court does hereby find as follows:

That on or about April 30, 2004 the Pike County Grand Jury returned two (2) separate indictments against Richard Simoneaux. In Cause Number 04-211-KB, Simoneaux was indicted for attempted burglary and two (2) counts of voyeurism. In Cause Number 04-212-KB, Simoneaux was indicted for sexual battery, sexual abuse of a vulnerable adult, and burglary of a dwelling. Simoneaux has now filed for an Application for Post-Conviction Relief pursuant to the Post-Conviction Relief Act, Mississippi Code Annotated, §99-39-1, et *seq* based on the following grounds:

1. Simoneaux's plea of guilty was made involuntarily because there is no proof in the record that the elements of the offenses for which he is charged were explained to him and because there was no factual basis for his guilty pleas.

2. Conviction for both sexual abuse of a vulnerable adult and sexual battery constitute double jeopardy under the facts of this case.
3. The portion of Simoneaux's sentence that banished him from the State of Mississippi upon his release from prison is an unconstitutional and illegal sentence as applied.
4. Simoneaux is being denied his statutory right to receive credit against his sentence for all time spent incarcerated.
5. Simoneaux received ineffective assistance of counsel.

During the plea hearing after Simoneaux was placed under oath, the following dialogue occurred between Simoneaux and the Court:

"THE COURT: Did he go over the indictments with you and the elements of the crimes?
DEFENDANT SIMONEAUX: Yes, sir.
THE COURT: Do you understand the elements of the crimes?
DEFENDANT SIMONEAUX: Yes, sir.
THE COURT: Did he go over the discovery material provided from the District Attorney's file?
DEFENDANT SIMONEAUX: Yes, sir.
THE COURT: The case reports and police reports and what-not?
DEFENDANT SIMONEAUX: Yes, sir.
THE COURT: Has he answered all your questions?
DEFENDANT SIMONEAUX: Yes, sir.
THE COURT: Are you satisfied with his representation?
DEFENDANT SIMONEAUX: Yes, sir."

In addition, the record clearly reveals that Simoneaux's guilty plea meets the requirements of *Bradshaw v. Stumpf* which states that a guilty plea is valid where it is entered into "voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." [FN: *Bradshaw v. Stumpf*, 545 175, 183 (2005).]

The Court further finds that Simoneaux's banishment does not violate any of Simoneaux's constitutional rights and that said portion of sentence is not illegal as applied.

Upon review of the record before the Court, the Court finds that the Application for Post-Conviction Relief filed by Richard Simoneaux should be and is hereby denied.

SO ORDERED AND ADJUDGED on this the 29 day of August 2007.

David H. Strong, Jr.
CIRCUIT COURT JUDGE
Pike County, Mississippi
Post Office Drawer 1387
McComb, Mississippi 39649
601/684-3400
601/684-2700 (fax)
MS Bar No. 9664

[FILED AUG. 31, 2007]

Supreme Court of Mississippi

Richard A. Simoneaux
v.
State of Mississippi

NO. 2007-CT-01983-COA
March 04, 2010

Disposition: Denied.

[Contained in a table captioned "Supreme Court of Mississippi Petitions for Writ of Certiorari."]

IN THE CIRCUIT COURT OF PIKE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS CAUSE NOS. 04-211-KB & 04-212-KB

RICHARD SIMONEAUX

****

TRANSCRIPT OF THE PLEA AND SENTENCE HEARINGS HAD AND DONE IN THE ABOVE STYLED AND NUMBERED CAUSES, BEFORE THE HONORABLE MIKE SMITH, CIRCUIT JUDGE, ON THE 28TH DAY OF JUNE, 2004, IN MAGNOLIA, MISSISSIPPI.

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APPEARANCES:

Present and Representing the State:

HONORABLE DEWITT T. BATES, JR., District Attorney

Present and Representing the Defendant:

HONORABLE PAUL LUCKETT, Public Defender

REPORTED BY: SUSAN BARR SMITH, CSR 1007
Official Court Reporter
CHANGE OF PLEA HEARING

MAGNOLIA, MISSISSIPPI

THE COURT: Cause Numbers 04-212-KB and 04-211-KB, State versus Richard Simoneaux.

(DEFENDANT SWORN.)

THE COURT: Mr. Simoneaux, are you under the influence of any drugs or alcohol or medicine or narcotics this morning?

DEFENDANT SIMONEAUX: No, sir.

THE COURT: Your attorney has announced that you wish to withdraw the not-guilty pleas made earlier to sexual battery, sexual abuse of a vulnerable adult, burglary, attempted burglary, and voyeurism -- two counts of that --and plead guilty at this time. Is that your desire?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: You have certain rights we must make sure
you understand before we can consider your plea. You have a right to have an attorney to represent you at all stages of the proceedings. Mr. Luckett is your attorney. Has he been with you in court at all stages of the proceedings?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Did he go over the indictments with you and the elements of the crimes?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Do you understand the elements of the crimes?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Did he go over the discovery material provided from the District Attorney's file?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: The case reports and police reports and what-not?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Has he answered all of your questions?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Are you satisfied with his representation?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: You have a right to a trial by jury, the right to challenge the make-up of the Grand Jury that indicted you, and of the trial jury that would try your case. You have the right to have subpoenas issued through the Circuit Clerk's office to be served on your witnesses so they would be available to testify for you at trial. You have the right that

anyone who testifies against you must do so in your presence, and the right for your attorney to cross-examine any witness who testifies against you. You have the right to not give any information that would incriminate you or furnish any evidence at all. You have the right to testify, as well as the right not to testify, and the right to make your own mind up as to whether or not you want to testify. You do not have to prove anything. The burden of proof is entirely upon the State to prove your guilt by credible evidence and beyond a reasonable doubt. And if the State fails to so prove your guilt beyond a reasonable doubt, the jury would be under a duty to find you not guilty. You have the right that all twelve jurors would have to agree as to any verdict of guilty or not guilty. Even if you were found guilty by the verdict of the jury, you would still have the right to appeal to the Mississippi Supreme Court. Do you understand each of those rights?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: On Count 1, sexual battery, no minimum sentence and no minimum fines on any of the five counts. On Count 1, the maximum sentence is 30 years and a $10,000 fine. On Count 2, sexual abuse of a vulnerable adult, the count -- the maximum is 10 years and the maximum fine is $10,000. On Count 3, burglary -- must be burglary of a dwelling.

MR. LUCKETT: Yes, sir.

DEFENDANT SIMONEAUX: Yes, sir.

COURT: -- burglary of a dwelling, the maximum is 25 years and the maximum fine is $10,000. On attempted burglary, the maximum is 7 years and a $10,000 fine. On voyeurism, two counts, the maximum on each count is 5 years, and totaling 10 years. All of those maximums add up to 82 years sentence. And all of the fines add up to a $50,000 fine. Do you understand those maximum penalties?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Do you understand that a guilty plea waives all these rights and places you in a position where you can be sentenced by the Court up to the maximum penalty provided by law?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Has anyone threatened, abused, or promised you anything to cause you to want to plead guilty?

DEFENDANT SIMONEAUX: No, sir.
THE COURT: Are you pleading guilty because you are guilty, and for no other reason?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Are you satisfied that the State can prove beyond a reasonable doubt that you are guilty?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: Have you fully understood all of your rights?

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: How do you plead?

DEFENDANT SIMONEAUX: Guilty.

THE COURT: Does the State have a recommendation?

MR. BATES: Yes, sir. On Count 1, sexual battery, 30 years, with 5 years suspended, for 25 years to serve, day for day, 5 years probation. For abuse of a vulnerable adult, it's 10 years, 2 suspended, for 8 years to serve, 5 years PRS. Burglary of a dwelling, 25 years, 0 years suspended, for 25 years to serve, for 5 years PRS. And that's all on Cause Number 04-212-KB. Also, the recommendation of the State is to get a mental health evaluation and to be ordered to follow whatever their recommendation is of Mental Health. And when he completes the sentence, to leave the State of Mississippi, Your Honor. Recommendations on Cause Number 04-211-KB, 7 years on attempted burglary, 1 year suspended for 6 years to serve on 5 years PRS. Voyeurism, first count, 5 years, 1 suspended, 4 years to serve, with 5 years PRS. Count 2 of voyeurism, 5 years, 1 suspended, for 4 years to serve on PRS. Also, the same recommendations -- get Mental Health evaluation, follow it, be ordered to follow it, and leave the State of Mississippi upon completion of his sentence. No restitution, and a fine at the Court's discretion.

MR. LUCKETT: And, Mr. Bates, just for the record, we summed this up as a 25-year flat sentence, this recommendation?

MR. BATES: 25 years, day for day, yes, sir.

THE COURT: The Mississippi Code requires on a sex offender that a copy of the Code be attached to your Know-Your-Rights. And to make sure we do everything right, Mr. Luckett, if you would, go over the provisions with him and then attach it to it and then bring him back.

MR. LUCKETT: The sex offender, yes, sir. He is already registered in both states.

THE COURT: He is?

MR. LUCKETT: Is that right, Mr. Simoneaux?

DEFENDANT SIMONEAUX: Louisiana and Mississippi.

THE COURT: Go over ours with him again and then bring him back.

MR. LUCKETT: Yes, sir.

(OTHER MATTERS NOT RELATED TO THIS CAUSE WERE HAD AND ARE OMITTED HEREFROM.)

THE COURT: All right, back on the record on 04-211-KB, and, in particular, 04-212-KB. And we have

a Code Section 45-31-1, provisions of the sex offense act,
that we are attaching to the Know-Your-Rights. Any of the victims wish to be here for sentencing?

MS. MURRELL: No, Your Honor.

THE COURT: Okay. Do you have anything you want to say before I sentence you?

EFENDANT SIMONEAUX: Your I have had-- I have had problems for a long time and I would greatly appreciate as much help for myself as possible, prior to my
release and after my release from the MDOC.

THE COURT: All right, sir. On 04-211, Count 1, I sentence you to 7 years, with the first year suspended, the remaining 6 years to be served on post-release supervision. Count 2, 5 years, the first year suspended, the remaining to be served on --

(BRIEF PAUSE.)

THE COURT: Count 1, 7 years, serve the first 6, with the last one to be served on 5 years post-release supervision. Count 2, sentence you to 5 years, serve the first 4 years, with the remaining one to be served on 5 years post-release supervision. Count 3, 5 years, serve the first 4 years, with the remaining one year to be served on -- let's see, the max is-- on one year. Count 3 on 211 is what? Which one is the voyeurism?

MR. BATES: The voyeurism is two 5's, max. The one on top is actually attempted burglary, Your Honor. That's the max, 7. The one that you're on right now, attempted burglary, is the 7.

THE COURT: I tell you what let's do. We've got 5 counts on the Know-Your-Rights. They're not broken down as to the cases. Y'all get together and let me have another Know-Your-Rights that lets me have one Know-Your-Rights for 04-211 and one Know-Your-Rights for 04-212. I am going to rescind what all I have done so far and we'll crank up when y'all have those two Rights, which will make it easier for me to follow.

(OTHER MATTERS NOT RELATED TO THIS CAUSE WERE HAD AND ARE OMITTED HEREFROM.)

THE COURT: Mr. Simoneaux, we are going to sentence you in 04-211-KB. Count 1 is attempted burglary. And I have lost my -- let's see what I did with the plea bargain. What did I do with it? Count -- well, let's see, now, he pled to 2 counts of voyeurism. So Count 1 is attempted burglary. Sentence you to 7 years, serve the first 6, with the last year to be served on 5 years post-release supervision. Count 2, voyeurism, 5 years, serve the first 4, with the remaining year to be served on 5 years post-release supervision. Count 3 is the second voyeurism count, 5 years, serve the first 4, with the remaining year to be served on 5 years post-release supervision. The counts will run concurrent. Sentences on each count will run concurrent and concurrent to the sentences given in 04-212-KB. Pay

$1,000 fine, $1,000 to the crime victim's comp fund, court costs, $750 attorney's fee. In Cause Number 04-212, Count 1, sexual battery, 30 years, serve the first 25, day for day, with the remaining Count 2, sexual abuse of a vulnerable adult, 10 years, serve the first 8, with the remaining 2 to be served on 5 years post-release supervision. Count 3, burglary of a dwelling, 25 years -- I hate to give a maximum on a plea -- 20 years to serve, with the remaining 5 years to be served on 5 years post-release supervision. The sentences in each count are to run concurrently and to run concurrently with the sentence in 04-211-KB. $1,000 fine, $1,000 to the crime victim comp fund, court costs. And attorney's fee in the other one will be sufficient. Order that he be examined by a psychiatrist when he is received by the Department of Corrections and that he receive such psychiatric care as available to him for sexual offenses and for the tendency to commit sexual offenses during his admission -- during his incarceration. And that upon his release, upon his release in both of his cases, Ms. Brenda, that he be banned from the State of Mississippi. A condition of him staying out of jail on post-release supervision after his release be that he receive counseling for the tendency to commit sexual offenses from the local Mental Health Complex wherever he is at. Mr. Simoneaux, they're going to have church services wherever you are.

DEFENDANT SIMONEAUX: Yes, sir, I have already been attending them at the jail where I'm at now, sir.

THE COURT: Continue with that and ask the good Lord to help you get over this tendency to do such as what you have done.

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: You are to comply with the terms of

Section 45:33-1 when you get out

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: That will be your sentence.

DEFENDANT SIMONEAUX: Your Honor, may I ask a question?

THE COURT: Sure.

DEFENDANT SIMONEAUX: Upon my release, if I have any affairs in this state to settle before I will be able to reside in another, will I be allowed to do so?

THE COURT: I would suggest that you appoint — you sign a power of attorney to let somebody act in your behalf, Mr. Simoneaux.

DEFENDANT SIMONEAUX: Yes, sir.

THE COURT: You lucky somebody hasn't shot you. You really are. Somebody hasn't taken a violent measure toward you. I hope that the treatment will be successful and I hope that you can get yourself together with the good Lord and that you have His help to get yourself straight.

MR. LUCKETT: Your Honor, this is Ms. Smith, Mr. Simoneaux's mother. She has a -- I guess it's more of a request. That if it's possible to have him incarcerated in a facility for sex offenders? Which, I don't know where one would be, but --

THE COURT: I don't know that we've got any. This putting in the sentencing order to psychiatric exam and treatment may locate him at the special units in Rankin County. But I don't know. I can't order that. That very well may do it.

MS. SMITH: But how do I go about doing it, then?

THE COURT: You will have to -- he will go to Rankin County after he leaves here. And you can call there about visiting, get whatever their visiting days are and what-not.

MS. SMITH: Can we have the case -- someone assigned to his case?

THE COURT: It will be a case worker that will be assigned to his case there.

MS. SMITH: Talk to them?

THE COURT: Yes, ma'am.

MS. SMITH: I know where some are, but I don't know where they all are.

THE COURT: He will get a specific one assigned to him.

MS. SMITH: Okay. Judge, may I hug him, please?

THE COURT: As long as you don't hand him a handcuff key or a knife or a razor blade or something. Yes, you can hug him.

(THIS CONCLUDED THE HEARING OF THIS CAUSE.)